

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

UNITED RENTALS (NORTH AMERICA), INC.¹

Employer

and

CASE 3-RC-11336

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 832**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, (herein, the Act), a hearing was held before a hearing officer of the National Labor Relations Board (herein, the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that United Rentals (North America), Inc. (herein, the Employer) is a Delaware corporation with a facility located at 788 West Ridge Road in Rochester, New York,

¹ The name of the Employer appears as amended at the hearing.

where it sells, leases and services equipment. Annually, in the course and conduct of its business the Employer purchases and receives at its 788 West Ridge Road, Rochester, New York facility, goods and services valued in excess of \$50,000 directly from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it will effectuate the purpose of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that International Union of Operating Engineers, Local 832, (herein the Petitioner) is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner amended the petition at the hearing to seek an election in a bargaining unit comprised of all full-time and part-time heavy equipment technicians/mechanics, heavy equipment drivers and heavy equipment yard help employees, but excluding all office clerical employees, counter people, sales personnel, all household division employees and small engine mechanics, professional employees, guards and supervisors as defined in the Act. The Petitioner seeks to include in the unit only the following employees it considers "heavy equipment" employees: two "heavy equipment technicians/mechanics," one "heavy equipment driver" and one "heavy equipment yard help person."

The Employer seeks a bargaining unit consisting of all full-time and part-time counter staff, mechanics, yard help employees and drivers, but excluding clerical and outside personnel, and guards and supervisors as defined in the Act. The Employer's proposed unit would include the following employees: two counter staff employees, three mechanics, two yard help employees and two drivers.

The Petitioner stated at the hearing that it is willing to proceed to an election, if an alternate unit is found appropriate herein.

At issue is whether the counter staff employees Robert Brown and Melissa Harris should be included in the unit, and whether driver Kevin Ambeau, mechanic Mike Kaiser, and yard help employee Jim Courtney should be included in the unit. The Petitioner contends that the counter employees, and those employees in what Petitioner calls the Employer's "household division" (Ambeau, Kaiser and Courtney) should be excluded from the petitioned-for unit. Specifically, Petitioner contends that the counter staff and the employees in the "household division" do not share a community of interest with the "heavy equipment" employees. The Employer contends that because the counter staff employees share a community of interest with the mechanics, yard help employees and drivers, the counter staff employees should be included in the unit. The Employer also asserts that it does not classify its employees as "household division" or "heavy equipment" employees, and that the employees referred to by Petitioner as "heavy equipment" employees do not constitute a separate and distinct group.

The parties stipulated that the following employees occupy the positions set forth opposite their names, and that they should be included in any bargaining unit found appropriate herein: Rob Kettles – driver; Tim Blood – yard help; Daryle Welker – mechanic, and Mike Gladstone – mechanic.

The parties stipulated that the following employees should be excluded from the unit found appropriate: branch manager Mike Zink; operations manager Mike Zander; outside sales representatives Steve Erickson and Paul Willey, and clerical/administrative employee Ronnie Urquhart.²

² The parties stipulated that Mike Zink and Mike Zander are managerial employees. The record also establishes that Zink and Zander are supervisors within the meaning of Section 2(11) of the Act. The record also discloses that Urquhart is a clerical employee who assists employees with tasks, such as answering phone and using the computer, but who primarily performs administrative work.

The Employer rents, leases, sells and repairs a variety of equipment to or for homeowners, small businesses and commercial contractors. A majority of the Employer's sales are of smaller equipment to homeowners or small businesses. The record indicates that contractors may rent from the Employer smaller items typically associated with homeowners, (such as lawn and garden equipment); and that likewise, homeowners may rent larger construction equipment typically associated with contractors.³ Several years ago, the Employer acquired Durand Rental and took over its Ridge Road facility. The Employer currently has three locations within the Rochester region, Henrietta, Penfield and Ridge Road. There are 13 employees at the Ridge Road facility, which is the only facility at issue herein.

Mike Zink is the Employer's branch manager for all three Rochester area locations. Mike Zander, who reports to Zink, is the operations manager for the Employer's Ridge Road facility. Zander is responsible for scheduling employees, performing employee evaluations, and directly supervising all employees at the Ridge Road facility.

The Employer's Ridge Road facility consists of a customer showroom (including a counter area), warehouse/shop and equipment yard. The showroom has an entrance to the warehouse/shop, which is located to the rear and side of the showroom. The warehouse/shop contains inventory, including smaller equipment and other items for sale or rent. In addition, repairs to equipment are made in the warehouse/shop area. The Employer keeps some of its rental equipment in the showroom and in the front of the building, near the showroom. Larger equipment and some equipment requiring repair are kept in the yard in the rear of the facility.

³ The Employer rents a variety of equipment, such as saws, power equipment, industrial vacuum cleaners, and construction equipment, such as backhoes, excavators, and lulls. The Employer sells everything in its rental fleet. The Employer also sells supplies ranging from rain suits and silk fences to homeowner supplies. The record indicates that 75 percent of the Employer's transactions derive from small equipment sales, with those sales accounting for 60-65 percent of the Employer's revenue.

The Employer commenced providing heavy equipment sales, rental and repair services only within the past year. The Employer has not created a heavy equipment or small equipment division in its operations. The Employer's Ridge Road facility lacks any posted signs or other indications that it formally distinguishes between small equipment and heavy equipment in its operations or among its employees.

The branch manager and operations manager have their own separate offices and desks in the facility, as does Ronnie Urquhart, the clerical/administrative employee the parties have stipulated to exclude from the unit.⁴ The record indicates that senior counter employee Robert Brown may sometimes use the operation manager's office and desk, but that the other employees do not have or use an office or desk. The record fails to indicate to what extent Brown spends time in the operation manager's office.⁵ All of the petitioned-for employees and the employees at issue herein work in the counter area, warehouse/shop or the yard.

The two counter employees at the Ridge Road facility, Brown and Harris, handle customer inquiries, quote rates, check equipment availability, complete rental contracts, finalize transactions or invoices for pick up, demonstrate equipment for customers, make equipment reservations, enter information on a computer system, unload and load equipment, and assist other employees.

The counter employees typically perform transactions by receiving a telephone call from a customer or one of the outside sales representatives seeking equipment. The counter employees check on the computer system as to whether the equipment is in inventory and is available for the requested rental period. The counter employees quote rates, discuss additional charges, and answer questions about

⁴ As discussed above, the outside sales representatives also have been excluded from the unit. The outside sales representatives, who work away from the Employer's Ridge Road facility, are the only employees to receive a commission. The outside sales representatives perform sales functions for all three Employer facilities.

equipment specifications. The counter employees reserve equipment for customers, and finalize the transactions by completing sales and rental contract forms. Counter employees do not distinguish between “heavy equipment” transactions (such as for an excavator) versus “household” smaller equipment transactions (such as for a lawn mower).

The Employer has written job descriptions for the counter employees, which formally refer to “senior sales coordinator” and “sales coordinator” position. Brown is the Employer’s senior sales coordinator and Harris is the sales coordinator. The job descriptions for senior sales coordinator and sales coordinator list only minor differences. For example, assisting customers to load and unload equipment is listed as one of the job duties of the sales coordinator, while it is not listed in the senior sales coordinator job description. However, the record indicates that Brown, like Harris, loads and unloads equipment.⁶

The drivers deliver equipment to job sites, retrieve equipment and move equipment to the Employer’s other locations. While the job duties as described in the Employer’s job descriptions for tractor-trailer driver B (Kettles) and driver (Ambeau) are nearly the same, there are some differences. The job description for tractor-trailer driver B states that the driver B can operate heavy equipment such as semi-trucks and trailers (“roll-backs, or dove-tails”) and must hold a CDL, Class B driver’s license. The driver job description indicates that the driver can operate non-CDL equipment such as pickup trucks and other small equipment and vehicles, must hold a driver’s license, but does not require a commercial (CDL, Class B or higher) license.

⁵ Neither party contends that Brown is a Section 2(11) supervisor.

⁶ There are other minor differences. The senior sales coordinator is listed as the most senior person at the counter, assists in training sales coordinators, and has the primary responsibility for all of the listed duties; while the sales coordinator assists in training counter personnel.

Kettles, who started working for the Employer 10 months before the hearing, and who possesses a CDL-B license,⁷ primarily drives a Kenworth 300 truck which requires such a license. Kettles spends the majority of his time engaged in heavy equipment delivery and pick up, including delivery of bulldozers, backhoes, mini-excavators and lulls.⁸ Kettles' CDL license allows him to drive vehicles that Ambeau cannot drive because he lacks a commercial driver's license.⁹ Ambeau drives the smaller vehicles and is not able to move larger equipment, such as a boom lift, bulldozer or back-hoe because he does not possess a corresponding CDL. Kettles testified that Ambeau delivers to customers smaller equipment, such as a bobcat or a scissor lift.¹⁰ Kettles testified that while both he and Ambeau can drive a 19-foot scissor lift, Ambeau is not allowed to operate the taller scissor lifts.

Kettles and Ambeau perform the same driver job functions, in spite of the different equipment or vehicles they handle. Kettles does not exclusively work with heavy equipment. While Kettles works primarily with heavy equipment, during slow days, he also picks up smaller equipment, and will take a van for smaller items, such as a saw or carpet cleaner. Kettles moved small equipment approximately three or four times in a winter time period. Kettles also testified that the Employer has "heavy equipment" that even he is not allowed to handle, (such as large excavators, rollers and other equipment that require a trailer with a low boy) which are transported to customers by outside contractors.¹¹

⁷ Kettles possessed a CDL-B license before he worked for the Employer.

⁸ Various witnesses provided different definitions for "heavy equipment." Kettles defined heavy equipment as anything above a mini-excavator, scissor lift or bobcat. Mike Zink defined heavy equipment as including mini-excavators, back-hoes, bulldozers, and other excavators.

⁹ The Employer currently has two types of vehicles that require a CDL license. The Kenworth 300 truck, and an 8-wheel "roll back" truck that contains a lift device. The Kenworth 300 truck rolls back larger equipment, such as air equipment, bulldozers, and compressors. Additionally, the Employer has a roll-off vehicle that is used infrequently. The Employer also has two or three pickup trucks, a van, and other vehicles.

¹⁰ The record indicates that a bobcat is a small tractor, approximately six feet in height and five feet in width. A scissor lift is a tire ladder that can elevate.

¹¹ The record indicates that the Employer occasionally uses outside contractors to deliver certain equipment, depending on workload and vehicle accommodation.

Both drivers have the same work schedules. Both drivers attended the same forklift training and boom lift training. Mechanic Welker also attended the same boom lift training. Mechanic Gladstone was offered, or may have attended, the same boom lift training.

The mechanics (Gladstone, Welker and Kaiser) ensure that equipment is functioning properly, service rental equipment, and repair equipment for customers. The Employer's mechanic I job description states that the position handles major, more complicated, heavy equipment that requires mechanical background in various engines, and the ability to diagnose and repair hydraulic and electrical systems. The mechanic II description similarly requires a mechanical background in various engines, with some experience in hydraulic and electrical systems. Gladstone and Welker are classified as mechanic I. Kaiser is classified as a Mechanic II, because he has less experience at the facility.

Welker is routinely dispatched to perform mechanical work on larger, heavier equipment or contractor equipment away from the facility, because he has a service vehicle. Welker spends approximately 20-25 percent of his time performing equipment repairs away from the Employer's facility. While at the facility, Welker and Gladstone spend the majority of their time working on heavier equipment. Kaiser routinely works on smaller tools and equipment, such as lawn and garden products. However, Welker and Gladstone also work on smaller equipment. Manager Zink testified that Kaiser has similar expertise to the other two mechanics. The record does not establish the actual wage rates of these employees, but indicates that Welker receives the highest wage rate, followed by Gladstone. While the record is unclear, Gladstone may receive a higher wage than Kaiser. The differences in wages are based on experience, rather than on the type of equipment handled by each employee.

The yard help employees (Blood and Courtney) select tools and equipment for customers, demonstrate equipment for customers, load and unload rental equipment, assist mechanics and other

personnel, prepare and clean equipment, inspect rental equipment and delivery trucks for safety, check equipment fuel levels and mileage, and check equipment for damage. The Employer's "yard person" job description makes no distinction among yard help employees according to the type of equipment handled by them.

Blood unloads and loads equipment such as excavators and backhoes from tractor trailers, notes equipment fuel hours and provides this information to the counter employees, and "preps" equipment (such as a back-hoe or excavator) for rent, by washing or greasing it. Blood testified that Courtney loads and unloads smaller vehicles, services and cleans smaller equipment, and works on generators, roto-tillers, or compressors. When Courtney was initially employed, he worked on heavy equipment, including loading and unloading bulldozers and excavators. Courtney is currently unable to drive certain heavy equipment due to a restriction placed on his license, although he may clean and move heavy equipment while on the Employer's premises.¹² Blood works on both small and heavy types of equipment. Blood also preps small equipment at times, such as chain saws, lawn mowers, and jackhammers. Zink testified that both Blood and Courtney perform yard help work on both small and heavy equipment.

Blood and Courtney work the same hours, 7:00 a.m. to 5:30 p.m., with split lunch times. Blood fills in for Courtney when Courtney is at lunch or absent.

The record establishes that the employees at the Ridge Road facility have many overlapping job duties. In this regard, the counter employees perform duties that are performed by other employees. For example, the counter employees sometimes select equipment in the yard for customers, which is work usually performed by yard help employees. The counter employees also check equipment for

¹² The record is not clear as to the nature of this restriction, or when or whether such restrictions will be removed.

damage, and check fuel levels and mileage on equipment, which are tasks also performed by yard help employees, mechanics, and drivers. Moreover, all of the employees perform cleaning duties at the Ridge Road facility.

Employees in other job categories perform many of the counter employees' duties. For example, the yard help employees demonstrate equipment for customers as well as unload and load equipment, as do the counter employees. The mechanics also demonstrate equipment for the customers. The mechanics and drivers assist customers to load and unload equipment, a task that is part of the counter employees' described duties. Counter employees, yard employees, mechanics, and sometimes drivers, assist customers in the back of the facility with equipment. When the counter employees are absent, Kaiser, a mechanic, and Ambeau, a driver, perform counter duties. Kaiser also occasionally helps in the counter area and answers telephones when counter employees are busy. Yard help employees occasionally answer telephones and have performed computer transactions.

While counter employees perform work on the computer system as part of their job duties, the record establishes that some of the other employees have been trained on, or know how to use, the computer system. Yard help employee Blood testified that he had some training on the Employer's computer system. He has accessed the computer system to determine what equipment was available. Blood also testified that he believed that Courtney knew how to use the computer system and that he has observed Kaiser and Gladstone use the computer system.

Both drivers Kettles and Ambeau "assist as needed throughout the branch," in accordance with their job description, provide customer service, and ensure that customers can properly use equipment. Both drivers also perform yard work. For example, Ambeau will perform yard work when the yard help employees are busy. Kettles, on his own initiative, has assisted customers with equipment and has

assisted yard help employee Courtney. Mechanic Kaiser performs yard work, such as selecting equipment for a customer. Kettles testified that he has helped the mechanics clean and move machines, and that he has assisted the mechanics with equipment repairs. Kettles has loaded equipment in customer vehicles, a job function typically performed by yard help employees and counter employees. Kettles, like the yard help employees and counter employees, has demonstrated equipment for customers.

Yard help employee Blood often works with the mechanics on the heavier machinery. Blood, who initially worked only on small equipment, learned about heavier equipment from his experience on the job. The record also indicates that yard help employee Courtney may assist in smaller mechanical repairs. Blood and Courtney also drive Employer vehicles.¹³

The counter employees, drivers, mechanics and yard help employees receive the same vacation time, holidays, sick days, and profit sharing plan. They all are eligible for the same medical, dental and eye care plan. The drivers, mechanics, yard help employees, and one of the two counter employees, are hourly employees, and punch a time clock. Counter employee Brown is a salaried employee. However, it appears from the record that he is salaried, solely because he was a salaried employee when he was employed by Durand Rental and was kept on salary when the Employer took over from Durand Rental. Generally, the counter employees, drivers, mechanics, and yard help employees work the same schedule and number of hours a week, except yard help employee Blood, who works slightly fewer hours. The Employer allocates the same amount of time for lunch and breaks for counter employees, drivers, mechanics and yard help employees. Furthermore, all employees receive a

¹³ The record does not indicate what particular vehicles each of these yard help employees may drive.

discount for employee rental of equipment for personal use. Uniform personnel policies apply to all employees.

While no employees have permanently moved from one job classification to another, there is no policy which prohibits employees from doing so. All employees receive training on the equipment that the Employer sells and leases.

All mechanics, yard help employees and drivers wear the same uniform pants and work shirts. The counter employees wear uniform button-down shirts. All employees wear the Employer's logo on their uniforms. All mechanics, yard help employees and drivers have tools or a toolbox or a place to store tools.

ANALYSIS

In considering whether a petitioned-for unit is appropriate, the Board's policy is not to consider whether the requested unit is the *most* appropriate unit, but rather whether it is *an* appropriate unit. The Boeing Co., 337 NLRB No. 24, slip op. at 2 (2001); Black & Decker Mfg. Co., 147 NLRB 825, 828 (1964); Home Depot USA, Inc., 331 NLRB 1289, 1290 (2000). However, if the petitioned-for unit is deemed inappropriate, then the Board may examine alternative units suggested by the parties, and may exercise discretion in selecting an appropriate unit different from the parties' proposed units. The Boeing Co., supra. A unit is appropriate when the employees in the petitioned-for unit share a community of interest. NLRB v. Action Automotive, 469 U.S. 490, 494 (1985).

In order to determine whether the petitioned-for unit is appropriate, the Board conducts a community of interest test and examines factors such as wages; hours of work; employment benefits; nature of supervision; differences in qualifications, training and skills; differences in job functions and amount of time spent away from the plant situs; interchange or contact with other employees; integration

with the work functions of other employees; and history of bargaining. Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962). See also The Boeing Co., *supra*.

A plantwide or single-store unit is presumptively appropriate. P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963); Kalamazoo Paper Box Co., 136 NLRB 134, 135 (1962). However, a union is not required to request representation of a broader unit if a narrower unit is found to be appropriate. Ballentine Packing, 132 NLRB 923, 925 (1961). Each unit determination must have direct relevancy to the circumstances within which collective bargaining is occurring, and must relate to each case's particular factual situation. Kalamazoo, *supra*, at 137; Gustave Fischer, Inc., 256 NLRB 1069 (1981). In determining a unit, the Board avoids residual units or fragmented units caused by excluding a group of employees. Huckleberry Youth Programs, 326 NLRB 1272, 1273 (1998); Michigan Wisconsin Pipe, 194 NLRB 469, 470 (1971).

I find that counter employees share a community of interest with the drivers, mechanics, and yard help employees and should be included in the unit found appropriate herein. As discussed below, the counter employees share common wages, hours, benefits and supervision, have similar skills, frequent contact, and overlapping job functions with the employees in the petitioned-for unit.

The counter employees, like the other employees, are supervised by Mike Zander. They are covered by the same personnel policies as other employees, and counter employees work in the same facility with the other employees. Although the counter employees work mainly in the showroom, other employees frequently assist them in this area. The counter employees also work in the yard with other employees. While Brown may sometimes use one of the manager's offices, the record does not indicate to what extent he does so.

More specifically, the record is replete with examples of counter employees and the drivers, mechanics, and yard help employees performing each other's duties. The counter employees perform yard help employees' duties when they select equipment in the yard, and perform yard help employees', mechanics' and drivers' work when they check equipment for damage, fluid levels and mileage. There are many overlapping duties between counter employees and yard help employees, such as demonstrating equipment or unloading/loading equipment. Other employees perform counter employees' duties when they assist in unloading and loading equipment, or when they assist customers in the back of the facility with preparing equipment. Yard help employees, mechanics and drivers have assisted customers in the counter area, and have answered customer telephone calls. In the absence of a counter employee, Kaiser and Ambeau have performed counter employees' duties. Yard help employee Blood has frequent contact with counter employees when he provides fuel information to them.

Regarding skills and training, the counter employees possess a general knowledge about the Employer's equipment. While the counter employees have not attended boom lift training and forklift training, the record indicates that all employees have or can receive training on various equipment. There are no major differences in training and skills between the counter employees and other employees.¹⁴

The Petitioner, in its post-hearing brief, argues that the counter employees do not share a community of interest with the other employees because they work in a separate area, do not have tools, wear separate uniforms, have little integration with other employees working with the machinery, exclusively handle the telephones and rental sales contracts, and have computer training. Contrary to the

Petitioner's assertion, the counter employees do not work in an area isolated from other employees.

Although the counter employees do not utilize tools, this factor is mitigated by the extensive evidence of overlapping of job duties of the counter employees and the other employees included in the petitioned-for unit. Regarding uniforms, the record indicates that both counter employees and other employees wear uniforms with logos, although the counter employees wear different pants and shirts from other employees. These slight differences are insufficient to rebut the community of interest established by the facts presented in the record.

While counter employees fill out contract forms and other employees do not, the record does not indicate that counter employees receive any particular special training to perform these duties. In fact, the record indicates that Harris had no prior applicable training before assuming counter employee duties. As discussed below, other employees, such as the mechanics or yard help employee Blood have performed operations on the computer, such as work orders, or accessed the computer to determine the availability of equipment. The record indicates that Courtney and Ambeau can also use the computer system. Moreover, employees, such as mechanic Kaiser, driver Ambeau and yard help employees, have substituted for, or answered telephones for, the counter employees.

The counter employees share the same fringe benefits as the other employees. The counter employees work the same general schedule and number of hours per week, and share the same allocation for breaks and lunches. Harris, a counter employee, works as an hourly employee and punches a time clock like the other employees. Brown engages in the same duties as Harris. Although Brown is a salaried employee, he receives a salary only because of his pay arrangements with the predecessor employer. Because the difference in Brown's type of pay derives from historical or

¹⁴ Kettles appears to be the only employee who requires a particular license (CDL-B) which the counter employees do

administrative reasons, (rather than a difference in function from Harris) the difference in method of payment should not be a considered factor in excluding Brown from the unit. Swift & Co., 101 NLRB 33, 35 (1952) (where the Board included weekly paid employees with hourly paid employees in a unit, because the difference in payment arose from historical or administrative reasons).¹⁵

The Petitioner, relying upon Ore-Ida Foods, 313 NLRB 1016 (1994), and cases cited therein, argues that the fact some employees have assisted counter employees with telephones during busy periods is not persuasive, indicating that this is sporadic contact reflecting the “spirit of cooperation or civility” rather than an overlap of job functions. However, even assuming that the other employees’ assistance in answering telephone calls is sporadic, the record reveals there is an overlap of job functions and contact among all of the employees which constitutes more than mere sporadic contact associated with one-time assistance during an emergency, or occasional assistance during the press of business. See Maxim’s De Paris Hotel, 285 NLRB 377, 378 (1987), cited in Ore-Ida Foods, supra.¹⁶

The Petitioner also relies on Harron Communications, Inc., 308 NLRB 62 (1992), to support its position that counter employees should be excluded from the unit. In Harron, the Board adopted a Regional Director’s decision that nine customer service representatives should be excluded from a unit with installers and technicians. The Board stated that although there was considerable contact between the customer service representatives (CSRs) and the installers and technicians, the CSRs performed

not possess.

¹⁵ In Huckleberry Youth Programs, supra, at 1274, the Board held that where the wages and some benefits of certain classification of employees differed from other classifications, and where the employees at issue were functionally integrated with the other employees, the employees at issue should not be excluded from the unit. Also, in Four Winds Services, Inc., 325 NLRB 632 (1998), the Board held that “differences in compensation rates do not destroy a community of interest among employees and would not require that they be in separate units.”

¹⁶ Furthermore, Ore-Ida Foods, supra is further distinguishable. In Ore-Ida Foods, there were separate maintenance and production departmental sections with separate supervisors, the maintenance employees were required to enter and complete an apprenticeship program, and production workers perform peripheral work to the maintenance employees. Here, however, there is not separate supervision, or departments for counter employees and other

distinct duties from the other employees, were separately supervised, were administratively organized in a separate department, did not work in the field with tools or on any equipment, and were required to have separate computer experience. The CSRs worked different days and were required to possess a customer service background.

In the instant case, the employees do not have separate supervisors and the counter employees and the other employees are not in separate departments. Furthermore, the counter employees, like other employees in the petitioned-for unit, select equipment for customers, check equipment for damage and for fuel levels and mileage; and demonstrate, load and unload equipment. Moreover, unlike the CSRs in Harron, the counter employees work the same schedule as other employees, and are not required to possess particular training or background before assuming their counter duties. In sum, given the community of interest that they share with the employees in the petitioned-for unit, I find that the counter employees should be included in the unit.

I further conclude that the petitioned-for unit of “heavy equipment” employees does not comprise a functionally distinct, separate unit of employees, and that those employees Petitioner would exclude from the unit as “household division” employees, Ambeau, Courtney and Kaiser, share a community of interest with other employees, so as to warrant their inclusion in the unit.

The record fails to indicate that the Employer maintains a distinction between employees who handle heavy equipment and the other employees. The Petitioner’s assertion of different “household” and “heavy equipment” division does not appear to be based upon actual distinctions utilized by the Employer. The Employer’s employees sell, lease, rent and repair both heavy equipment and smaller equipment. The counter employees do not distinguish between transactions involving heavy equipment

employees. Furthermore, counter employees and other employees do not just perform peripheral work for each other,

and those involving smaller equipment; and individual homeowners, as well as contractors, purchase, lease or rent both types of equipment.

The Employer's inclusion of heavy equipment in its inventory is a relatively new occurrence. As described below, the employees who most often work with heavy equipment also frequently perform duties associated with household or smaller equipment. Furthermore, the record establishes that these employees are not solely responsible for heavy equipment work. Conversely, one of the drivers, Kettles, whom the parties stipulated to include in the unit, is not allowed to work on some heavy equipment (large excavators, rollers, and other equipment that require a trailer with a low boy), raising questions about what exactly constitutes heavy equipment for the purposes of determining an appropriate unit. The record is not clear as to whether a mini-excavator, for example, should be considered heavy equipment, or whether some equipment above that weight level constitutes heavy equipment. In this regard, for some equipment, such as the scissor lift, one model might be considered heavy equipment, while another model would not be so categorized.

The petitioned-for unit does not constitute an appropriate unit, because of the community of interest shared among a broader unit of employees. See United States Steel Corp., 192 NLRB 58, 60 (1971). Examining the community of interest factors, Ambeau, Kaiser and Courtney share similar hours, breaks, wages, benefits and working conditions with the other mechanics, other yard help employee, the other driver and the counter employees. For example, Ambeau shares the same schedule as Kettles, a driver the parties agreed to include in the unit; and Courtney shares the same hours as Blood, the yard help employee the parties agreed to include in the unit. Although Kaiser, one of the mechanics, might receive slightly lower wages than mechanics Gladstone or Welker, such a distinction in compensation is based

but rather fundamental duties. Ore-Ida Foods, supra at 1019-1020.

upon experience rather than on the type of equipment on which he works. As discussed above, all employees share common supervision under Zander, are covered by the same personnel policies, have similar work and benefit terms, and have frequent contact with each other.

Ambeau, Kaiser, and Courtney share similar qualifications, training and skills with other employees sought by the Petitioner. While the employees in the petitioned-for unit may handle heavy equipment more frequently, there is no indication that their actual job duties differ substantially from the employees the Petitioner would exclude from the unit. For example, while driver Ambeau does not possess a CDL-B license, he still performs the same job functions as Kettles, but on smaller equipment. Both Kettles and Ambeau provide similar assistance to other employees at the Ridge Road facility.

The record indicates that Kettles learned about moving heavy equipment on the job. Thus, there does not appear to be any impediment to Ambeau also acquiring heavy equipment skills on the job. Ambeau attended the same boom lift training as Kettles, Welker and Gladstone, who the Petitioner seeks to include in the unit. The record does not establish that mechanics Welker and Gladstone possess distinct certifications or credentials compared with mechanic Kaiser. Although the Petitioner, in its post-hearing brief, points to an employee witness' reference to Welker and Gladstone as "diesel" mechanics, the record also indicates that much of the heavy equipment is not diesel powered; thus, Welker and Gladstone's familiarity with diesel engine technology does not seem to be essential. There is no indication on the record that Welker and Gladstone possess a certain certification that Kaiser lacks.

Concerning the yard help employees, the record indicates that Courtney has operated heavy equipment in the past, including loading and unloading bulldozers and excavators, thus indicating that Courtney possesses whatever skills are necessary or unique to handling heavy equipment. While a

witness testified that Courtney could not deal with heavier equipment, because of restrictions placed upon his license, there is no indication as to whether such restrictions are permanent. There appears to be no impediment to Courtney also acquiring heavy equipment skills, as Blood also acquired heavy equipment skills as a result of his own aptitude and interest in such equipment. Moreover, the record does not indicate a distinction in the job description between yard help employees who perform heavy equipment duties and yard help employees that do not perform such duties.

As discussed above, there is generally a high degree of contact and overlapping job functions among the employees at the Employer's Ridge Road facility, which supports the conclusion that all employees share a sufficient community of interest with one another.

The record further establishes that the employees the Petitioner seeks to include in its "heavy equipment" unit also work on smaller equipment. For example, sometimes Kettles drives smaller equipment; mechanics Welker and Gladstone fix smaller equipment; and yard help employee Blood, who started out working on smaller equipment rather than heavy equipment, preps such smaller equipment as chain saws, lawn mowers, and jack hammers. When Courtney is on lunch break or is absent, Blood performs Courtney's work, including work on smaller equipment.

The Petitioner argues that the specialized skills of the "heavy equipment" employees preclude their interchangeability with other employees. However, the record establishes that many of the skills used in working with the heavy equipment are learned on the job. Moreover, the employees who work with heavy equipment also frequently work with those employees who primarily concentrate on smaller equipment. Finally, several of the employees who work on the smaller equipment are capable of assisting with the heavy equipment.

The Petitioner also argues that a factor supporting a finding that its petitioned-for unit is appropriate is its preference to only organize employees who work with heavy equipment because it has a bargaining history with heavy equipment employees in general, citing Ballentine Packing Co., 132 NLRB 923, 925 (1961). In Ballentine, the Board held that a union is not obligated to seek representation in the largest unit, but only an appropriate unit. The Board noted that it is not the Board's function to compel all employees to be represented or unrepresented at the same time or to compel a labor organization to represent employees it does not wish to represent, unless an appropriate unit does not otherwise exist. Ballantine, supra.

I conclude that because of the highly integrated workforce at the Ridge Road facility, the overlap in employee job functions, their similar terms and conditions of employment, and frequent contact, the broader unit consisting of all of the Employer's mechanics, yard help employees, drivers and counter employees is appropriate. In United States Steel Corp., 192 NLRB 58, 60 (1971), the Board held that based on interchange, routine contact, common supervision, transfers, and common conditions of employment, that the community of interest was "submerged into the broader community of interests" which those employees shared with other employees. See also J.C. Penney Co., 328 NLRB 766, 768 (1999) (where after analyzing community of interest factors, the Board concluded that telemarketing employees should be included in a broader unit it found appropriate). Although the Petitioner may prefer a smaller unit, controlling weight should not be given to its general preference in making a unit determination. As the Employer notes in its post-hearing brief, the Board does not approve fractured units, or combinations of employees that are too narrow in scope or that lack a rational basis. See Seaboard Marine, Ltd., 327 NLRB 556 (1999) (Board held that the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit and,

therefore, that the petitioned-for unit was an arbitrary unit); See also Michigan Wisconsin Pipe, 194 NLRB 469, 470 (1971).

Based on the foregoing, I find that the appropriate unit herein should include the counter employees, driver Ambeau, mechanic Kaiser, and yard help employee Courtney, as they share a community of interest with the petitioned-for employees.

APPROPRIATE UNIT

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, mechanics, yard help employees, and counter employees employed by the Employer at its Ridge Road, Rochester, New York facility; excluding the branch manager, operations manager, all office clerical/administrative employees, outside sales representatives, and all professional employees, guards and supervisors as defined in the Act.

There are approximately 9 employees in the bargaining unit found appropriate herein. As the Petitioner has expressed its willingness to proceed to election in the broader unit found appropriate herein, and as I am administratively satisfied that the Petitioner has a sufficient showing of interest to do so, I hereby direct an election in this matter.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their

status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 832.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Acting Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the Albany Resident Office, Room 342, Leo W. O'Brien Federal Building, Clinton Avenue and North Pearl Street, Albany, New York 12207 on or

before **June 13, 2003**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **June 20, 2003**.

DATED at Buffalo, New York this 6th day of June, 2003.

/s/Charles J. Donner
CHARLES J. DONNER,
Acting Regional Director
National Labor Relations Board – Region 3
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, New York 14202

classification index

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